18

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 338

DAVID H. JENNINGS, RECEIVER OF THE NATIONAL BANK OF AMERICA, AND NATIONAL BANK OF AMERICA, PETITIONERS,

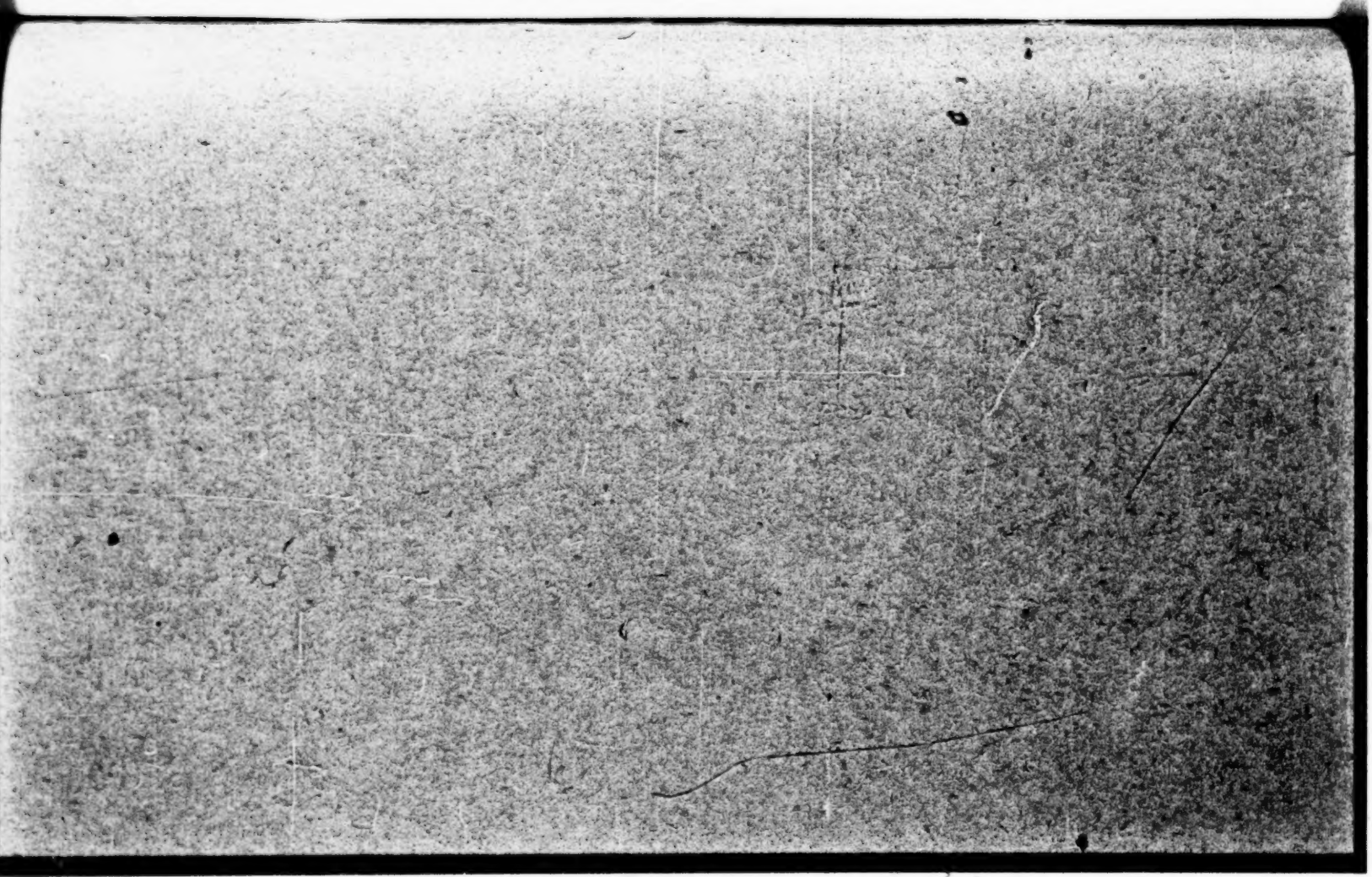
vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 31, 1934.

CERTIORARI GRANTED OCTOBER OCTOBER 8, 1934.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 338

DAVID H. JENNINGS, RECEIVER OF THE NATIONAL BANK OF AMERICA, AND NATIONAL BANK OF AMERICA, PETITIONERS,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE DISTRICT COURT OF THE UNITED STATES

Placita.

Fort the Northern District of Indiana,

Hammond Division.

Pleas and Proceedings of the District Court of the United States for the Northern District of Indiana, Hammond Division, begun and holden at the United States Court House in the City of Hammond, in said district, at the March Term, 1932, of said court, before the Honorable Thomas W. Slick, Judge of said court.

United States Fidelity and Guaranty Company, a corporation,
vs.
National Bank of America, a corporation; David H. Jennings, as Receiver of National Bank of America. } Law 538.

Be It Remembered, that heretofore, to-wit, at the March Term, 1932, of said court, on the 24th day of October, 1932, the defendant by its attorneys, McMahon & Smith, filed in the office of the Clerk of this court, transcript on removal from the Lake Circuit Court, Crown Point, Indiana, which transcript contained bill of complaint, petition to remove from the Lake Circuit Court of Indiana to the United States District Court for the Northern District of Indiana, notice of filing of petition to remove and acknowledgment of service, bond for removal, which read in the words and figures following, to-wit:

2 State of Indiana } ss.
County of Lake }

plaint filed
t. 24, 1932.

IN THE LAKE CIRCUIT COURT

September Term, 1932

United States Fidelity and Guaranty Company, a corporation,
Plaintiff,
vs.
National Bank of America, a corporation, David H. Jennings, as Receiver of National Bank of America,
Defendants.
} Cause No. 23265.

COMPLAINT.

United States Fidelity and Guaranty Company, plaintiff herein, complains of the above-named defendants and for its cause of action against said defendants alleges:

That plaintiff is a corporation organized under the laws of the State of Maryland and is engaged in the business of surety for hire and of insuring against casualties; that plaintiff has been duly admitted to do business in the State of Indiana and is duly licensed to carry on said business in said State.

That defendant National Bank of America is a national banking association organized under the national bank Act of the United States, and defendant David H. Jennings, is the receiver thereof under appointment by the Comptroller of the Currency of the United States.

That on the ..... day of December 1931 plaintiff received a check for the sum of $2196.89, payable to it, from Com-
3 mercial Trust Company of Gary Indiana, drawn by said Trust Company upon the Gary State Bank of Gary, Indiana:

That on or about the 29th day of December, 1931, plaintiff deposited said check for collection with Security Trust Company of Indianapolis, Indiana, as agent for plaintiff, which last named Trust Company turned said check over to Fletcher American National Bank of Indianapolis, Indiana as sub-agent for collection; that said last named bank turned

said check over to defendant National Bank of America as sub-agent of plaintiff's said agent for collection in plaintiff's behalf:

That defendant National Bank of America presented said check to said drawee bank and received payment therefor in said sum of $2196.89 from said drawee bank and forwarded said sum on the ..... day of January, 1932 to Fletcher American National Bank of Indianapolis, Indiana, from which last mentioned bank said defendant bank had received said check for collection:

That soon thereafter, defendant, David H. Jennings, was duly appointed receiver of defendant National Bank of America by the Comptroller of Currency of the United States and is now such receiver; that said receiver demanded of said Fletcher American National Bank the return of said sum of $2196.89 so collected and forwarded by defendant National Bank of America, and said Fletcher American National Bank did pay over said sum so received by it to said receiver who has ever since held said sum. That said sum when so collected by defendant National Bank of America was held by it in trust for plaintiff and was forwarded by it as such trustee to said Fletcher American National Bank, which bank also held the same in trust for plaintiff; that when said sum was paid to said receiver by said Fletcher American National Bank the same was a trust fund in plaintiff's favor and
4 that defendant National Bank of America had no interest therein or right thereto and that said receiver had no interest therein and no right thereto; that said sum in said receiver's hands constitutes trust funds in favor of plaintiff and at all times were and now are, exclusively the property of plaintiff and at no time constituted assets of said defendant bank.

That plaintiff has made demand on defendants for said sum so received and held by them, but that each of defendants refused and still refuse to pay the same over to plaintiff. That plaintiff is entitled to have said sum paid to it by said receiver in full before said receiver pays any sums to creditors of defendant bank out of the assets of said bank, together with interest thereon since the ..... day of January, 1932.

That defendant receiver refuses to allow and pay plaintiff's said claim as a claim entitled to preferred payment over the general creditors of defendant bank, and that defendant bank by and through said receiver and the said receiver will, unless enjoined from so doing, wrongfully treat

said trust fund as constituting assets of defendant bank and will wrongfully apply the same to the payment of the expenses of said receivership and will wrongfully distribute the same, after the payment of receivership expenses, ratably among the creditors of defendant bank; that the assets of defendant bank together with the said trust fund would not be sufficient to pay plaintiff's said claim in full if said claim were allowed as a general claim and if it would participate ratably with other general creditors in the distribution thereof; that unless defendants are enjoined from doing the wrongful acts aforesaid plaintiff will suffer irreparable damage.

5 That plaintiff is entitled to an injunction against defendants enjoining them from using said trust fund as assets of defendant bank or of said receivership for the payment of said receivership expenses or for distribution among the creditors of defendant bank and enjoining defendants from making any payments to general creditors of defendant bank until after they shall have first paid plaintiff in full the amount of said trust fund, and plaintiff is entitled to a decree adjudging that plaintiff shall recover from defendants the said sum of $2196.89 with interest thereon forthwith and before defendants make any payments to such general creditors.

That plaintiff has no adequate remedy at law in the premises.

Wherefore, plaintiff prays that defendants each be permanently enjoined from using any part of said trust fund as assets of defendant bank or of said receivership for the payment of receivership expenses or for distribution among the creditors of defendant bank and from making any payments to general creditors of defendant bank until after they shall have first paid plaintiff in full the amount of the said trust fund; plaintiff further prays that the court adjudge and decree that plaintiff shall recover from defendants the said sum of $2,196.89 with interest thereon and that defendants shall pay the same to plaintiff forthwith and before they make any payments to general creditors of defendant bank; plaintiff further prays that it recover its costs laid out and expended in this action, and for all other proper relief in the premises.

PICKENS, DAVIDSON, GAUSE, GILLIOM & PICKENS,
ARTHUR L. GILLIOM,
Attorneys for Plaintiff.

6 State of Indiana, } ss:
County of Lake. }

IN THE LAKE CIRCUIT COURT,

Petition f
Removal

Sitting at Crown Point,

September Term, 1932.

United States Fidelity and Guaranty Company, a corporation,
vs.
National Bank of America, a corporation, and David H. Jennings, as Receiver for the National Bank of America. } Cause No. 23265.

PETITION OF DEFENDANTS TO REMOVE CAUSE TO THE UNITED STATES DISTRICT COURT FOR THE HAMMOND DIVISION OF THE NORTHERN DISTRICT OF INDIANA.

Come now the National Bank of America and David H. Jennings, as Receiver of the National Bank of America, defendants in the above entitled cause and respectfully show to this honorable court that this is an action commenced against these petitioners by the filing of a complaint in the Circuit Court of Lake County, state of Indiana, and the issuing of a summons to these defendants to appear in court on the third day of October, 1932, to answer said complaint of the plaintiff, United States Fidelity and Guaranty Company, a corporation.

The plaintiff's alleged cause of action as set forth in said complaint, is to recover a judgment against these defendants for the sum of Two Thousand One Hundred Ninety Six and 89/100 ($2,196.89) Dollars, with interest thereon from the ..... day of January, 1932, which said sum it is alleged the defendant, National Bank of America, collected for the plaintiff herein and which the said defendant bank
7 held in trust for the plaintiff herein, and which sum the said plaintiff asks may be allowed as a preferred claim against the said defendants, it being alleged in said complaint that in December, 1931, the plaintiff received a check for $2,196.89, payable to it from the Commercial Trust Com-

pany of Gary, Indiana, drawn by said trust company upon The Gary State Bank, of Gary, Indiana.

That plaintiff deposited said check for collection with the Security Trust Company of Indianapolis, as agent for plaintiff and said last named trust company turned said check over to the Fletcher American National Bank of Indianapolis as sub-agent. That said last named bank turned said check over to the defendant, National Bank of America, as sub-agent of plaintiff, for collection in plaintiff's behalf. That the defendant, National Bank of America, presented said check to The Gary State Bank and received payment therefor in the sum of $2,196.89, and forwarded said sum, on the ..... day of January, 1932, to the Fletcher American National Bank of Indianapolis, Indiana.

That soon thereafter the defendant and petitioner herein, David H. Jennings, was duly appointed receiver of said National Bank of America by the Comptroller of the Currency of the United States and is now such receiver.

That said receiver demanded of said Fletcher American National Bank the return of said sum of $2,196.89 so collected and said Fletcher American National Bank did return and pay over said sum so received by it to the said David H. Jennings, as Receiver of said National Bank of America, who ever since, has held said sum. That said sum, when collected by the defendant, National Bank of America, was held by it in trust for plaintiff, and that neither the defendant
National Bank of America, nor the defendant, David H.
8 Jennings, as receiver of said bank, has any interest
therein or right thereto, and that said sum in the hands of said receiver constitutes a trust fund in favor of the plaintiff, United States Fidelity and Guaranty Company. That the plaintiff has demanded that said receiver pay said sum over to the plaintiff, but that said receiver refuses to allow and pay said claim as a claim entitled to preference over the general creditors of the National Bank of America.

Your petitioners further show that the defendant, National Bank of America, is a corporation organized under the laws of the Congress of the United States and as such was, on January, 2, 1932 and for many years prior thereto, engaged in the banking business in the city of Gary, Lake county, Indiana. That the said National Bank of America became insolvent, and on January 4, 1932, the Comptroller of the Currency of the United States took possession of said last named bank and its assets, and that thereafter, to-wit: on the 10th day of February, 1932, the said Comptroller of the Currency appointed

the defendant, David H. Jennings, as receiver for the said National Bank of America for the purpose of administering its assets and closing up its business affairs, and that he is now the duly acting and qualified receiver of said bank by virtue of an appointment from the Comptroller of the Currency of the United States of America.

Your petitioners further show to the court that plaintiff's alleged cause of action and the controversy herein between the plaintiff and these petitioners is an action against a bank organized under the laws of the United States, to-wit: the National Bank of America; that it is a case which relates
9 to the winding up of the affairs of said insolvent National Bank of America and that it is an action brought against an officer and agent of the United States; namely, David H. Jennings, Receiver of said National Bank of America and is an action arising under the laws of the United States of America and that it is the desire of your petitioners to remove said cause from this honorable court to the United States District Court for the Hammond Division of the Northern District of Indiana, in accordance with the provisions of the acts of Congress of the United States in that behalf and provided.

Your petitioners file and offer herewith bond with good and sufficient security as required by law, for its entering into the United States District Court, Hammond Division of the Northern District of Indiana, within thirty days of the filing of said petition, a certified copy of the record in said suit and for paying all costs that may be awarded by the said District Court of the United States for the Hammond Division of the Northern District of Indiana, if said District Court shall hold that such suit was wrongfully and improperly removed thereto and also for its appearing and entering special bail in such suit, if such special bail was originally requisite therein according to the provision of the Act of Congress in such case made and provided.

Your petitioners further show that written notice of this petition and said bond for removal was given to the plaintiff herein prior to the filing of this petition, by service of notice and a copy of this petition and said bond upon said attorneys of record in this case, on the 30th day of September, 1932.

That by reason of the facts aforesaid, these petition-
10 ers are entitled to removal of this suit to the United States District Court for the Hammond Division of the Northern District of Indiana.

Wherefore, petitioners pray the court to proceed no fur-

ther herein except to make an order of removal, as required by law, and to accept said surety and bond and cause the records hereof to be removed to the United States District Court for the Hammond Division of the Northern District of Indiana, and for all other proper relief in the premises.

McMAHAN & SMITH
Attorneys for the Defendants, National Bank of America, and David H. Jennings, Receiver for the National Bank of America.

11 State of Indiana } ss:
County of Lake }

IN THE LAKE CIRCUIT COURT

Sitting at Crown Point

September Term, 1932.

United States Fidelity and Guaranty Company, a corporation
vs.
National Bank of America, a corporation, and David H. Jennings, as Receiver for the National Bank of America. } Cause No. 23265

AFFIDAVIT.

WILLIS C. McMAHAN, being duly sworn upon his oath deposes and says that he is one of the attorneys for the National Bank of America and for David H. Jennings, receiver of the National Bank of America, the defendants in the above entitled cause, and has authority to make and does make this affidavit for and on behalf of said defendants and each of them.

That he has read the foregoing petition, knows the contents thereof, and says that said petition is true to the best of his knowledge and belief.

(Signed) WILLIS C. McMAHAN

Subscribed and Sworn to before me this 28th day of September, 1932.

(Signed) JEANNETTE EMMETT
Notary Public

My commission expires: Sept 25 1935.

12 State of Indiana } ss:
County of Lake }

IN THE LAKE CIRCUIT COURT

Bond on Removal.

Sitting at Crown Point

September Term, 1932.

United States Fidelity and Guaranty Company, a corporation
vs.
National Bank of America, a corporation, and David H. Jennings, as Receiver for the National Bank of America.

BOND ON REMOVAL.

Know All Men By These Presents: That David H. Jennings, as Receiver for the National Bank of America, as principal, and the National Surety Company of New York, a corporation duly organized and existing under and by virtue of the laws of the state of New York, and having authority to transact business in the state of Indiana, as surety, are held and firmly bound unto the United States Fidelity and Guaranty Company, a corporation, in the sum of Five Hundred ($500.) Dollars, for the payment of which well and truly to be made unto the said United States Fidelity and Guaranty Company, to said David H. Jennings, as Receiver of the National Bank of America, and the National Surety Company of New York bind themselves, their successors and assigns, jointly and firmly by these presents.

The condition of this obligation is such that:

Whereas, the above named United States Fidelity and Guaranty Company has heretofore brought a suit of a civil nature in the Lake Circuit Court of the state of Indiana, against the National Bank of America and David H.
13 Jennings, as Receiver of the National Bank of America; and

Whereas, the said defendants, National Bank of America and David H. Jennings, as Receiver of the National Bank of America, simultaneously with the filing of this bond, intend to file their petition in said suit in such state court for the

removal of such suit into the District Court of the United States for the Hammond Division of the Northern District of Indiana, according to the provisions of the Act of Congress in such cases made and provided.

Now, therefore, the condition of this obligation is such that if said petitioners, the National Bank of America and David H. Jennings, as Receiver for the National Bank of America, shall enter in the District Court of the United States for the Hammond Division of the Northern District of Indiana within thirty days of the filing of said petition, a certified copy of the record in such suit and for paying all costs that may be awarded by the said District Court if said District Court shall hold that said suit was wrongfully or improperly removed thereto, and also for appearing and entering special bail in such suit, if special bail was originally requisite therein, then the above obligation shall be void, but shall otherwise remain in full force and effect.

In Witness Whereof, David H. Jennings, as Receiver of the National Bank of America, and the said National Surety Company of New York has caused this instrument to be signed by its duly authorized agents and officers and its corporate seal to be hereunto affixed this 29th day of September, 1932.

(Signed) DAVID H. JENNINGS
David H. Jennings,
Receiver for National Bank of America, Principal

14 NATIONAL SURETY COMPANY OF NEW YORK,
By J. BOROWSKI
J. Borowski
(Seal) *Resident Vice-President, Surety*
Attested:
D. L. SHEARER
D. L. Shearer
Resident Assistant-Secretary

15 And afterward, to-wit, at the March Term, 1933, of said court, and on the 15th day of May, 1933, before the Honorable Thomas W. Slick, Judge of said court, the following further proceedings were had in said cause, to-wit:

Come now the parties herein and file stipulation for transfer of this cause to the South Bend Division of this court, which stipulation reads in the words and figures following, to-wit:

16 IN THE DISTRICT COURT OF THE UNITED STATES Filed May 1933.

For the Northern District of Indiana

Hammond Division

United States Fidelity and Guaranty Company, a corporation
vs.
National Bank of America, a corporation, and David H. Jennings, as Receiver for the National Bank of America. } Law No. 538

Comes now the above named plaintiff by its attorneys, Pickens, Davidson, Gause, Gilliom and Pickens, and come also the defendants by their attorneys, McMahan & Smith, and stipulate and agree that this cause may be transferred from the Hammond Division of said court to the South Bend Division of said court, and the said plaintiffs and the said defendants hereby consent that the court make and enter of record an order transferring this cause to the South Bend Division of said court.

PICKENS, DAVIDSON, GAUSE, GILLIOM AND PICKENS,
Attorneys for Plaintiff.
McMAHAN & SMITH
Attorneys for Defendants.

17 And thereupon, the following further proceedings were had in said cause, to-wit:

Come now the defendants and files its answer in one paragraph, which answer reads in the words and figures following, to-wit:

18 • • (Caption) • •

ANSWER.

Come now the defendants, National Bank of America and David H. Jennings, as Receiver for the National Bank of America, and for answer to the plaintiff's complaint, admit

that the plaintiff is a corporation organized under the laws of the state of Maryland and is engaged in the business of surety for hire and of insuring against casualties. That plaintiff has been admitted to do business in the state of Indiana and is duly licensed to carry on said business in this state.

That the defendant, National Bank of America, is a banking association organized under the National Banking Act of the United States and that the defendant, David H. Jennings, is the receiver of said National Bank of America under appointment by the Comptroller of the Currency of the United States.

That the plaintiff, in December, 1931, received from the Commercial Trust Company of Gary, Indiana, a check for the sum of Two Thousand One Hundred Ninety Six and 89/100 ($2,196.89) Dollars, payable to the plaintiff and drawn by said trust company upon the Gary State Bank. That on the 31st day of December, 1931, the defendant National Bank of
19 America received said check from the Fletcher American National Bank of Indianapolis, Indiana, for collection and remittance.

The defendants, further answering, say that on January 2, 1932, and for more than five years prior thereto, there was an organization in the city of Gary, Indiana, known as the Gary Clearing House Association organized by and comprised of the banks doing business in the said city of Gary, and which association was organized for the purpose of facilitating the exchange of checks and settling the balances with and among the several members of said association. That during all the time mentioned in this answer and during the time mentioned in the complaint herein, the National Bank of America, the First National Bank of Gary, and the Gary State Bank were members of said clearing house association. That on December 31, 1931, and on January 2, 1932, the said National Bank of America, the First National Bank of Gary, and the Gary State Bank were the sole and only members of the said clearing house association.

That on January 2, 1932, and for several years prior thereto it was the custom and practice of the banks which were members of said clearing house association to have a representative of and from each of said banks meet a representative from each of the other member banks of said association at the rooms and office of said association at ten o'clock a. m., of every business day, for the purpose of exchanging checks received by each of said members before nine thirty o'clock

a. m., of that day, and which were drawn upon the various banks which were then members of said association, for the purpose of exchanging such checks so drawn upon and
20 against the several members of said association and settling the accounts of said banks with each other. That it was the custom of said banks and of said association when, upon the presentation and exchange of checks by said members banks to and through said association, it was found that the checks drawn on any of said banks and presented for payment through the clearing house association exceeded the amount of the checks drawn on other member banks and which such other banks held, for the debtor bank to pay such difference to the clearing house association by the draft of such debtor bank drawn upon its correspondent bank in the city of Chicago, Illinois, after which the said clearing house association would distribute such difference to the member banks entitled thereto.

The defendants, further answering, say that prior to nine thirty o'clock a. m., of December 31, 1931, the said National Bank of America received from the Fletcher American National Bank of Indianapolis, Indiana, for collection, checks drawn on other banks in Gary aggregating in the sum of $3,661.83, including said check for $2,196.89, drawn by the Commercial Trust Company of Gary on the Gary State Bank. That in addition to said check for $2,196.89, the said National Bank of America, at said time, had received other checks drawn on the Gary State Bank in the sum of Five Thousand Eight Hundred Ninety eight and 67/100 ($5,898.67) Dollars. That the said National Bank of America also, at said time, had received in the usual course of business, checks drawn on the First National Bank of Gary in the aggregate sum of Two Thousand Three Hundred Twenty nine and 89/100 ($2,329.89) Dollars, making a total of Ten Thousand Four Hundred Twenty five and 45/100 ($10,425.45) Dollars of checks so held by the National Bank of America and drawn on the other two members of said
21 clearing house association, and which were, on said 31st day of December, 1931, presented by said National Bank of America to the said clearing house association for exchange and clearance.

That the other member banks of said association; namely, the Gary State Bank and the First National Bank of Gary, on said day held and presented to the said clearing house association checks drawn on said National Bank of America

in the sum of Eleven Thousand Four Hundred Seventy and 19/100 ($11,470.19) Dollars. That as a result of said clearings and exchange of checks on the morning of said 2nd day of January, 1932, the said National Bank of America was indebted to and owed the clearing house association the sum of One Thousand Forty four and 75/100 ($1,044.75) Dollars for which said last named sum the National Bank of America drew its check or draft on the Continental Illinois Bank and Trust Company of Chicago, Illinois, payable to the order of said clearing house association and delivered said check to the said clearing house association in settlement of the said sum of $1044.75 which said National Bank of America owed said clearing house association, and that the assets and funds of the National Bank of America were not increased or augmented by reason of the collection of said check of $2,196.89 so received from the Fletcher American National Bank of Indianapolis, Indiana.

The defendants, further answering the plaintiff's complaint, say that they are not advised as to the relation existing between the Fletcher American National Bank of Indianapolis and the plaintiff, United States Fidelity and Guaranty Company, and do not know whether the said check for $2,196.89 drawn by the Commercial Trust Company of Gary, Indiana, on the Gary State Bank was owned by the Fletcher American National Bank or whether, when said last
22 named bank sent said check to the National Bank of America, it was acting as an agent for plaintiff in so sending said check to the National Bank of America.

And further answering said complaint, the defendants say that the said National Bank of America, in collecting said check for the said Fletcher American National Bank of Indianapolis, was acting as the agent of the said last named bank. That for several years prior to the 2nd day of January, 1932, it was the custom of said Fletcher American National Bank to send checks drawn on banks in the city of Gary, other than the defendant bank, to the said National Bank of America for collection. That during all of said time, as the said Fletcher American National Bank well knew, it was the custom of the National Bank of America to present such checks so drawn on the other member banks of the clearing house association in Gary to the said clearing house association for clearance and collection; that it was not, as said Fletcher American National Bank well knew, the custom of the National Bank of America to present the checks so

sent to it for collection, to the drawee bank and to receive from the drawee bank money in payment thereof; that on December 31, 1931, and for a long time prior thereto, it was the custom of the National Bank of America, as the Fletcher American National Bank well knew, when collection of such checks was made through the clearing house association, for the said National Bank of America to draw its check or draft in favor of the said Fletcher American National Bank on a correspondent bank of the National Bank of America and to send such check or draft to the said Fletcher American National Bank in payment of the collection so made.

And the said defendants, further answering the plain-
23 tiff's complaint, admit that the National Bank of America was, at the time when it ceased doing business, indebted to the owner of the said check for $2,196.89, in the sum of $2,196.89, and that the owner of said check is entitled to have the amount of said check allowed and paid as a general claim without any preference over other general creditors of the National Bank of America, but defendants deny each and every allegation of plaintiff's complaint not herein admitted, and say that plaintiff's alleged claim is not, and should not be allowed as preferred.

Wherefore, the defendants pray that this honorable court adjudge and decree that the claim of the plaintiff be not allowed and ordered paid as a preferred claim.

McMahan & Smith,
Attorneys for Defendants.

24 And thereupon, the following further proceedings were had in said cause, to-wit:

And now the plaintiff offers in evidence PLAINTIFF'S EXHIBIT 1, being stipulation of facts, as evidence, which Exhibit 1 is now admitted in evidence, and reads in the words and figures following, to-wit:

(The stipulation of facts was incorporated by the court in the Special Finding of Facts, and is copied in full and set out on pages 26 to 41 of the transcript.)

Sept. 13, 3. 25 * * (Caption) * *

ENTRY FOR SEPTEMBER 13, 1933.

Comes now Thomas W. Slick, Judge of the District Court of the United States for the Northern District of Indiana, and assumes the bench, and the following proceedings were had in the above entitled cause:

The Court having heard the evidence consisting wholly of a written stipulation of facts entered into by the parties hereto and being designated as plaintiff's exhibit No. 1, and having heard the argument of counsel, and being sufficiently advised in the premises, now adopts said stipulation of facts as and for its special finding of facts, and signs and files its special findings of fact and conclusions of law thereon, which said special findings of fact and conclusions of law are as follows, to-wit:

26 * * (Caption) * *

FINDINGS OF FACT.

The court finds specially the facts as follows, the same being stipulated by the parties, to-wit:

27 * * (Caption) * *

STIPULATION OF FACTS.

The plaintiff, by Arthur L. Gilliom, its attorney, and the defendants, by Willis C. McMahan and J. Edwin Smith, their attorneys, stipulate that the following facts are true and shall constitute the evidence in this cause:

1.

Plaintiff, United States Fidelity and Guaranty Company, is a corporation organized under the laws of the State of Maryland and is engaged in the business of surety for hire and of insuring against casualties; that plaintiff has been duly admitted to do business in the State of Indiana and is duly licensed to carry on said business in the State of Indiana; that plaintiff's principal office and place of business is in Baltimore, Maryland, and that during all of the times

herein mentioned plaintiff maintained an office in the city of Indianapolis, Indiana.

2.

The defendant, National Bank of America, is a National Banking association organized under the National bank act of the United States, and as such was, on January
28 2, 1932, and for many years prior thereto, continuously engaged in the general banking business in the City of Gary, County of Lake, State of Indiana; that the 1st day of January 1932 was New Years day and a National holiday and said bank was not open for business on that day; that said bank was open on Saturday, January 2nd, 1932, and did a regular banking business on that day until one o'clock in the afternoon, that being the regular closing hour for said bank on Saturdays; that said bank never opened for business after one o'clock of the afternoon of January 2nd, 1932; that on Sunday January 3rd, 1932 the directors of said bonk held a meeting and adopted a resolution to the effect that said bank should not open for business the following Monday, January 4, 1932, and on said 3rd day of January said board of directors notified the Chief National Bank Examiner for the Seventh Federal Reserve District of the adoption of said resolution. That on January 4, 1932, at about eight A. M., the Comptroller of Currency of the United States, through the National Banking Department and by F. F. Robinson, a deputy national bank examiner, took charge of said bank, and thereafter had continuous charge thereof until the defendant receiver took charge thereof on the 10th day of February 1932; that said receiver has been in continuous charge of said bank ever since said 10th day of February, 1932.

That said bank was insolvent on the fourth day of January, 1932, and has ever since then been insolvent; that the assets of said bank have at no time since its insolvency been sufficient to pay all of its debts in full, nor will they be; that on the 4th day of January, 1932, the Comptroller of the Currency of the United States took possession of said bank and of its assets, and said bank has not engaged in the banking business since then.

29 3.

The defendant, David H. Jennings, was duly appointed as receiver of said National Bank of America on the 10th

day of February, 1932 by the said Comptroller of the Currency for the purpose of administering its assets and closing up its business affairs, and that he has ever since been, and now is, the duly acting and qualified receiver of said bank in virtue of his said appointment from said Comptroller of the Currency of the United States.

4.

On the 30th day of December, 1931, plaintiff, United States Fidelty and Guaranty Company, received from Commercial Trust Company of Gary, Indiana, a check for the sum of $2196.89, dated December 29, 1931, payable to the order of plaintiff, which check was drawn by said Commercial Trust Company, as drawer, on the Gary State Bank of Gary, Indiana, as drawee. Said check was given to plaintiff, as aforesaid, in payment of an amount in the sum of said check then owing to plaintiff by said Commercial Trust Company on account of bond and insurance premiums collected by said Trust Company for the plaintiff.

5.

On the 30th day of December, 1931, plaintiff endorsed said check, which endorsement is as follows:

"Pay to the order of
Security Trust Company
Indianapolis
90 Prior endorsements guaranteed 90
United States Fidelity and Guaranty Co.
Foster & Messick, Mgrs."

On said last mentioned day plaintiff deposited said
30 check so endorsed, along with several other checks the aggregate amount of all of which checks was $10,927.31, with Security Trust Company of Indianapolis, Indiana. Said Security Trust Company was then a trust company organized under the laws of Indiana doing a general banking business under the laws of Indiana at said City of Indianapolis.

The manner in which said deposit of said check was made is as follows:

Plaintiff tabulated the amounts of said checks, including said check for $2,196.89, on adding machine tape with an adding machine and stamped its name, United States Fidelity and Guaranty Company on said tape ahead of the tabulated amounts of said checks, and immediately under-

neath said name plaintiff wrote the date "12-30-31". Said tape bearing said name, date and tabulated amounts of said checks was then pinned by plaintiff to a printed form of deposit slip furnished by said Security Trust Company to its depositors for use in making deposits in said Security Trust Company, which form of deposit slip and the printed matter thereon were as follows:

31 "No. ..... Credit Account of

.....

(Name of Depositor)
Security Trust Company
Indianapolis, ... 193....

Items other than currency on this slip credited only for collection at the depositor's risk, whether collected directly or indirectly. Please list each check separately

	Dollars	Cents
Currency	.....	.....
Gold	.....	.....
Silver	.....	.....
Checks as follows	.....	.....
. . ..	.....	.....
. . ..	.....	.....
. . ..	.....	.....
. . ..	.....	.....
. . ..	.....	.....
. . ..	.....	.....
. . ..	.....	.....
. . ..	.....	.....
Total $	.....	.....

See that all checks and drafts are endorsed"

32 Thereupon, on said 30th day of December, 1931 plaintiff delivered said tabulated checks, including said check of $2,196.89 from Commercial Trust Company, together with said deposit slip and attached tape bearing said name, date and tabulated amounts of said checks, to said Security Trust Company and received on said day a credit to its, plaintiff's account with said Security Trust Company in said total sum of $10,927.89 because of deposit of said checks, including said check for $2,196.89.

6.

Thereupon, on or about the 30th day of December, 1931, said Security Trust Company endorsed said check for $2,196.89 issued by Commercial Trust Company and so de-

posited by plaintiff and deposited the same on said day to its account with Fletcher American National Bank of Indianapolis, Indiana and then received credit in the sum of said check from said Fletcher American National Bank; that said endorsement is as follows:

"Pay to the order of
any bank, banker or trust Co.
20-11 Security Trust Co. 20-11
C Indianapolis, Ind.
Wm. C. Kassebaum, Secy.
Dec. 31, 1931"

Said Fletcher American National Bank was then a national bank doing a general banking business in the City of Indianapolis, Indiana.

In depositing said check in Fletcher American National Bank on December, 30, 1931, said Security Trust Company made out a deposit slip on the printed form regularly used at said Fletcher American National Bank and delivered the same with the checks, including said check for
33 $2,196.89, deposited by it in Fletcher American National Bank on that day. At the time said deposit slip was so delivered, there was pinned thereto on a separate piece of paper a tabulated list of the checks being deposited and aggregating the sum of $176,962.39 shown on said deposit slip, including said check for $2,196.89. Said deposit slip so made out and delivered was as follows:

34 "Deposited for the Account of
Security Trust Company

The Fletcher American National Bank of Indianapolis	With the Fletcher American National Bank	The Fletcher American National Bank of Indianapolis

Indianapolis, Dec 30 1931 19.....

In receiving items, this bank acts only as the depositor's collecting agent and assumes no responsibility for loss in the mails, or through the failure of any direct or indirect collecting agent. Until actual funds or solvent credits have come into its possession this bank reserves the right to charge to the depositor's account any amount so credited. Checks on

this bank are credited subject to their being good when charged in the ordinary course of business.

	Dollars	Cents
Currency		
Gold		
Silver		
Checks	176,962	39
14 Dec 30 1931		
Total		

35 Thereupon, on or about the 30th day of December, 1931 said Fletcher American National Bank endorsed said check as follows:

"Pay any bank or banker or order
Prior endorsements guaranteed
14 Dec 30 1931 14
The Fletcher American Natl. Bank
of Indianapolis
20-1 Ralph K. Smith 20-1
Vice-Pres. & Cashier"

Said check so endorsed was then mailed, on or about the 30th day of December, 1931, by said Fletcher American National Bank to its correspondent bank the National Bank of America at Gary, Indiana for collection from said drawee Gary State Bank, and for remittance to said Fletcher American National Bank, and said check was received for said purposes by National Bank of America in the morning of December 31, 1931.

8.

On January 2, 1932, and for more than five years prior thereto, there was an organization in the city of Gary, Indiana, known as the Gary Clearing House Association organized by and comprised of the banks doing business in the said city of Gary, and which association was organized for the purpose of facilitating the exchange of checks and settling

the balances with and among the several members of said association. That on and prior to said last named day, the National Bank of America, the First National Bank of Gary, and the Gary State Bank were members of said clearing house association. That on December 31, 1931, and on January 2, 1932, the said National Bank of America, the First
36 National Bank of Gary, and the Gary State Bank were the sole and only members of the said clearing house association.

That on January 2, 1932, and for several years prior thereto it was the custom and practice of the banks which were members of said clearing house association to have a representative of and from each of said banks meet a representative from each of the other member banks of said association at the rooms and office of said association at ten o'clock a. m., of every business day, for the purpose of exchanging checks received by each of said members before nine thirty o'clock a. m., of that day, and which were drawn upon the various banks which were then members of said association, for the purpose of exchanging such checks so drawn upon and against the several members of said association and settling the accounts of said banks with each other. That it was the custom of said banks and of said association when, upon the presentation and exchange of checks by said member banks to and through said association, it was found that the checks drawn on any of said banks and presented for payment through the clearing house association exceeded the amount of the checks drawn on other member banks and which such other banks held, for the debtor bank to pay such difference to the clearing house association by the draft of such debtor bank drawn upon its correspondent bank in the city of Chicago, Illinois, after which the said clearing house association would distribute such difference to the member banks entitled thereto.

That prior to nine thirty o'clock a. m., of December 31, 1931, the said National Bank of America received from the Fletcher American National Bank of Indianapolis, Indiana, for collection, checks drawn on other banks in Gary aggregating in the sum of $3,660.83, including said check for
37 $2,196.89 drawn by the Commercial Trust Company of Gary on the Gary State Bank. That in addition to said check for $2,196.89, the said National Bank of America, at said time, had received other checks drawn on the Gary State Bank in the sum of Five Thousand Eight Hundred

Ninety-eight and 67/100 ($5,898.67) Dollars. That the said National Bank of America also, at said time, had received in the usual course of business, checks drawn on the First National Bank of Gary in the aggregate sum of Two Thousand Three Hundred Twenty-nine and 89/100 ($2,329.89), Dollars, making a total of Ten Thousand Four Hundred Twenty-five and 45/100 ($10,425.45) Dollars of checks so held by the National Bank of America and drawn on the other two members of said clearing house association, and which were, on said 31st day of December, 1931, presented by said National Bank of America to the said clearing house association for exchange and clearance.

That the other member banks of said association; namely, the Gary State Bank and the First National Bank of Gary, on said day held and presented to the said clearing house association checks drawn on said National Bank of America in the sum of Eleven Thousand Four Hundred Seventy and 19/100 ($11,470.19) Dollars. That as a result of said clearings and exchange of checks on the morning of said 31st day of December, 1931, the said National Bank of America was indebted to and owed the clearing house association the sum of One Thousand Forty-four and 75/100 ($1,044.75) Dollars for which said last named sum the National Bank of America drew its check or draft on the Continental Illinois Bank and Trust Company of Chicago, Illinois, payable to the order of said clearing house association and delivered said check to the said clearing house association in settlement of the said sum of $1,044.75 which said National Bank of
38 America owed said clearing house association.

National Bank of America would have owed and paid said clearing house the sum of $2,196,89 more than it did owe and pay said clearing house on December 31, 1931, if it had not received, presented and exchanged said check for $2,196.89 on said day.

Said drawee Gary State Bank received said check for $2,196.89 as a result of said clearing house transaction on said 31st day of December, stamped the same paid on said day, charged the account of drawer Commercial Trust Company with the amount thereof and delivered it stamped paid to said drawer.

9.

That for several years prior to the 2nd day of January, 1932, it was the custom of said Fletcher American National

Bank to send checks drawn on banks in the city of Gary, other than the defendant bank, to the said National Bank of America for collection. That during all of said time, as the said Fletcher American National Bank well knew, it was the custom of the National Bank of America to present such checks so drawn on the other member banks of the clearing house association in Gary to the said clearing house association for clearance and collection; that it was not, as said Fletcher American National Bank well knew, the custom of the National Bank of America to present the checks so sent to it for collection, to the drawee bank and to receive from the drawee bank money in payment thereof; that on December 31, 1931 and for a long time prior thereto, it was the custom of the National Bank of America, as the Fletcher American National Bank well knew, when collection of such checks was made through the clearing house association, for the said National Bank of America to draw its check or
39 draft in favor of the said Fletcher American National Bank on a correspondent bank of the National Bank of America and to send such check or draft to the said Fletcher American National Bank in payment of the collection so made.

When National Bank of America collected said checks drawn on Gary banks aggregating $3,660.83, including said check for $2,196.89 drawn on Gary State Bank, and while it was still conducting its regular banking business, it drew its draft dated December 31, 1931, on Continental Illinois Bank & Trust Company of Chicago, Illinois, payable to Fletcher American National Bank in said sum of $3,660.83 and mailed the same to Fletcher American National Bank at Indianapolis on the 31st day of December, 1931, in remittance of the amount collected by it upon said checks, including said check for $2,196.89. At said time National Bank of America had on deposit at said Continental Illinois Bank and Trust Company a sum greater than the amount of said draft.

10.

Fletcher American National Bank received said draft for $3,660.83 from National Bank of America on January 2nd, 1932, and on the same day it endorsed said draft and mailed the same to said Continental Illinois Bank and Trust Company for the purpose of receiving payment thereon.

Continental Illinois Bank and Trust Company received said draft at Chicago on January 4, 1932, by which time the

said National Bank of America had suspended business and was in charge of said Comptroller and Continental Illinois Bank and Trust Company for that reason refused to pay said draft and returned the same unpaid to Fletcher American National Bank at Indianapolis on January 4, 1932.

11.

40 At the time when said draft was received by Fletcher American National Bank from Continental Illinois Bank & Trust Company after payment thereof had been refused, and on the 5th day of January, 1932, said National Bank of America had on deposit to its account with Fletcher American National Bank the total sum of $3,994.74. On said 5th day of January, 1932, said Fletcher American National Bank charged on its books to the said account of National Bank of America the amount of said returned draft in the sum of $3,660.83. On March 3, 1932 Fletcher American National Bank paid to said receiver the balance, after said charge of $3,660.83, of said account of National Bank of America, and retained the amount so charged against said account because of said returned draft.

Thereafter, and prior to July 7, 1932, said receiver demanded of Fletcher American National Bank that it pay to him the amount of said draft so charged against said account of National Bank of America, and thereupon Fletcher American National Bank did, in compliance with said demand, pay said sum of $3,660.83 to said receiver on the 18th day of July, 1932.

12.

On July 7, 1932 Fletcher American National Bank charged the amount of said check for $2,196.89, which was included in said sum of $3,660.83, against said account of Security Trust Company, and said Security Trust Company did in turn on the 7th day of July, 1932, charge plaintiff's said account with said sum of $2,196.89 which it had originally credited to plaintiff's account at the time when said check was deposited as aforesaid.

Plaintiff's account with Security Trust Company has ever since remained diminished by the said amount of $2,196.89 so charged against it on the 7th day of July,
41 1932, and plaintiff has not received payment from anyone for any part of said check for $2,196.89 deposted by

it with Security Trust Company on said day of December, 1931.

13.

National Bank of America did not remit for the sum so collected by it through said clearing house upon said check for $2,196.89 drawn on, and paid by, said Gary State Bank otherwise than by means of said unpaid draft for $3,660.83 drawn by it on Continental Illinois Bank & Trust Company. Said unpaid draft was returned by Fletcher American National Bank to said receiver.

At the time said receiver took charge of National Bank of America there were in possession of said bank cash items in excess of $2,196.89. There have at all times been, and now are, in possession of said receiver cash items in excess of $2,196.89.

Plaintiff made demand before commencement of this suit upon said receiver for payment to it in full of said sum of $2,196.89 collected by said bank upon said check, but said receiver refused and still refuses to pay to plaintiff the same sum in preference over general claims. The receiver has at all times been, and now is, willing to pay upon said amount of $2,196.89 as a general claim ratable dividends as and when declared. Said receiver has at all times treated, and intends to treat, said sum of $2,196.89 as a part of the assets of said bank for ratable distribution among the creditors of said bank.

Signed on the 15th day of May, 1933.

(Signed) PICKENS, DAVIDSON, GAUSE, GILLIOM & PICKENS,
Attorney for Plaintiff.
McMAHAN & SMITH,
Attorneys for Defendants.

42 CONCLUSIONS OF LAW.

Upon the above special findings of fact as stipulated the court finds the following conclusions of law:

1.

That the cash items of defendant National Bank of America became impressed with a trust in plaintiff's favor in the sum of $2,196.89 at the time said check was collected by said National Bank of America, and the receiver Jennings took over said sum of money subject to said trust.

2.

That plaintiff is entitled to recover said sum of $2,196.89, together with interest at the rate of 6%, from the defendant receiver in preference to the general creditors of said bank.

3.

Plaintiff is entitled to recover its costs against the defendant in this action.

4.

In all respects the law is with plaintiff.

(Signed) THOS. W. SLICK,
Judge, U. S. District Court.

September 13, 1933.

43 And the same are ordered filed and made a part of the record in this case, all of which is now done.

And now an exception is granted by the court to each defendant to each of said conclusions of law.

And now the Court files its OPINION in this cause, which is as follows:

44 * * (Caption) * * Filed Sept 1933.

Arthur L. Gilliom, Indianapolis, Ind. attorney for plaintiff.

McMahan & Smith, Gary, Ind., attorneys for defendants.

Slick, Judge.

The facts in this case are all stipulated and the stipulation of facts is incorporated verbatim in the special findings of fact. The facts are voluminous and it is not necessary to recite in this memorandum of opinion all of the facts.

Briefly, the facts are that Commercial Trust Company of Gary drew its check on the Gary State Bank payable to the plaintiff herein in the sum of $2,196.89. This check came to the plaintiff and was deposited with Securities Trust Company of Indianapolis for collection. The Securities Trust Company in turn deposited the check with the Fletcher American National Bank of Indianapolis for collection. The Fletcher American National Bank sent the check to the National Bank of America of Gary for collection. The check

was received by the National Bank of America at Gary on December 31, 1931.

45 It was at this time, and had been for a long time, the practice and custom of the National Bank of America, when it received collections from Fletcher American National Bank, to make such collections through the clearing house at Gary and to remit by draft on Chicago. This custom was well known by Fletcher American National Bank and was followed in this case, the check being presented on December 31, 1931, to the Gary State Bank through said clearing house at Gary.

The National Bank of America closed its doors January 2, 1932. A draft of which the check in question was a part, was issued by the National Bank of America to Fletcher American National Bank, but failed to clear before the National Bank of America closed its doors. Defendant Jennings, receiver of National Bank of America, took possession of all the assets of the National Bank of America, and took possession of the $2,196.89 in question.

The question to determine in this case is whether plaintiff be allowed a preferred claim in the full amount of $2,196.89, or whether it receive on its claim only ratable dividends paid to general creditors. The serious question for decision is whether a collection made by a national bank operating in the state of Indiana where the statute provided that the collecting bank act as agent or sub-agent for the purpose of collection, shall be paid in full. In other words, does the Indiana Uniform Bank Collection Code govern here or is it a nullity so far as national banks operating in Indiana are concerned?

The federal statutes and decisions in reference to distribution of assets of insolvent national banks control and provide for ratable dividends by the Comptroller of money of a bank turned over to him by the receiver of such national bank. In other words, the receiver reduces the

46 assets to cash and turns this cash, together with all other cash belonging to the bank, over to the Comptroller, who in turn ratably divides it amongst all claimants.

The question then resolves itself to the inquiry as to whether the *money* in the hands of the receiver *collected* under the Indiana Uniform Bank Collection Code, was the *money* of the bank, and so constituted assets, or was the *money* held in, or impressed with, a trust and hence not assets of the bank, which the receiver in charge could legally

turn over to the Comptroller for ratable distribution under the federal statute.

There is no donbt that the National Banking Act and decisions of the federal courts control in the distribution of the assets of an insolvent national bank. They, the assets, must be ratably distributed to all the creditors, but did the *money* in controversy constitute assets of the bank? Did the *money* so collected belong to the bank? Did the bank get title to the *money,* or was it the *money* of plaintiff held in trust by the insolvent bank?

Defendant argues that to adopt the theory that the statute of Indiana is controlling on the question of agency is equivalent to holding that each state in the union may adopt rules for distribution of assets of insolvent national banks. The results are not so far reaching.

The federal rule is that a receiver of an insolvent national bank shall turn over for distribution the assets of the failed bank, not the assets, cash, or property of some other person held by such insolvent bank as agent or in trust. The federal rule does not require that *money* in the possession of an insolvent national bank as agent shall be considered assets.

The Indiana state rule is that *money* collected as
47 this *money* was, shall be held by the collecting bank as agent. There appears to be no conflict between the federal statute providing for ratable distribution of assets and the decisions of the federal courts under that statute and the Uniform Bank Collection Code of Indiana. National banks are amenable to the laws of the state in which they operate. They are governed in all respects by the state law except where the state law contravenes the federal law, in which case the federal law is controlling. See *McClellan* v. *Chipman,* 164 U. S. 347, where the Supreme Court of the United States lays down the rule in the following language:

> "The rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States.

The court in this opinion used the following language:

> "The purpose and object of Congress in enacting the national bank law was to leave such banks as to their contracts in general under the operation of the state law,

s
3.

and thereby invest them as Federal agencies with local strength, whilst, at the same time, preserving them from undue state interference wherever Congress within the limits of its constitutional authority has expressly so directed, or wherever such state interference frustrates the lawful purpose of Congress or impairs the efficiency of
48 the banks to discharge the duties imposed upon them by the law of the United States."

The state law of Indiana provides explicitedly that the funds in question shall be held as agent or sub-agent. The federal law contains no contrary provision. To sustain plaintiff's contention is to give effect to the Indiana code as well as to the federal acts. To sustain defendant's contention would be to destroy the effect of the Indiana code as applied to national banks. The constitutionality of the Indiana Uniform Bank Collection Code is not challenged. It is and was in full force and effect at the time of this transaction.

Section 2, Chapter 164 of the Indiana Acts of 1929, page 515, provides that "where an item is deposited or received for collection, the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be sub-agent of the depositor."

Section 1 of the same act at 514, provides, that "the term 'bank' shall include any person, firm or corporation engaged in the business of receiving and paying deposits of money within this state."

No authority has been cited and, I think none can be, that directs or permits the appropriation by a receiver of funds held in trust or as agent for another person. These funds must be paid over by the receiver to the owner thereof. They do not constitute assets of the failed bank, do not belong to the bank, and the receiver has no right to hold them or pay them over to the Comptroller for distribution, or to do anything with them except to turn them over to the rightful owner, the plaintiff in this case.

THOS. W. SLICK
Judge, U. S. District Court.

September 13, 1933.

ed Sept.
1933.

49 And now the Court renders judgment and decree upon said special findings of fact and conclusions of law.

It Is Therefore Considered, Adjudged and Decreed by the Court that plaintiff have and recover of and from the defendants the total sum of $2,429.32, consisting of the principal

sum of $2,196.89 and of interest in the sum of $232.43 out of cash and cash items in the possession of the defendant David H. Jennings, as receiver of defendant National Bank of America in preference over creditors of said bank. Said defendant David H. Jennings, as such receiver, is hereby ordered to pay forthwith to plaintiff said sum of $2,429.32 in full out of cash and cash items in his possession as such receiver, and each of the defendants are hereby permanently enjoined from using so much of the cash and cash items in said receiver's possession as is needed to satisfy this judgment and decree for any purpose other than for the satisfaction of this judgment and decree.

It is further ordered that the plaintiff recover from the defendants its costs herein expended, the same to be taxed by the clerk of this Court, and have execution therefor.

(Signed) THOS. W. SLICK,
Judge.

50 And afterward, to-wit, at the November Term, 1933, of said court and on the 8th day of November, 1933, before the Honorable Thomas W. Slick, Judge of said court, the following further proceedings were had, to-wit:

Come now the defendants and file their petition for appeal, which petition reads in the words and figures, to-wit:

51 * * (Caption) * *

Filed No
1933.

PETITION FOR APPEAL.

Filed November 8, A. D. 1933.

To: The Honorable District Court of Indiana, Northern District, Hammond Division, Thomas W. Slick, Judge:

The defendants, National Bank of America, a corporation, and David H. Jennings, as Receiver for the National Bank of America, considering themselves aggrieved by the decree entered herein on the 13th day of September, 1933, in the above entitled cause, do hereby jointly and severally appeal therefrom to the Circuit Court of Appeals for the Seventh Circuit for the reasons specified in the assignment of errors, which is filed herewith, and they pray that their appeal may be allowed; that a citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon

which said decree was based, be duly authenticated and sent to the Circuit Court of Appeals for the Seventh Circuit, sitting in the City of Chicago, Cook County, Illinois.

And inasmuch as this is an appeal by the Receiver of a National Bank appointed by and acting under authority
52 of the Comptroller of the Currency, your petitioners further pray that the proper order relating to the security to be required of them to perfect their appeal be made.

NATIONAL BANK OF AMERICA and
DAVID H. JENNINGS, as Receiver for the National Bank of America,
By McMAHAN, STROM & HULBERT,
Their Attorneys.

The petition granted and appeal allowed and shall act as a supersedeas without bond.

THOS. SLICK,
Judge, District Court, Northern District of Indiana.

53 And thereupon, the following further proceedings were had in said cause, to-wit:

Nov. 8. * * (Caption) * *

NOTICE BY DEFENDANTS, NATIONAL BANK OF AMERICA, AND DAVID H. JENNINGS, AS RECEIVER FOR THE NATIONAL BANK OF AMERICA, OF THE TAKING OF AN APPEAL.

To: United States Fidelity & Guaranty Company, a corporation:

You will please take notice that on the 8th day of November, 1933, at four o'clock P. M., or as soon thereafter as counsel may be heard, the defendants, National Bank of America and David H. Jennings, as Receiver for the National Bank of America, by McMahan, Strom & Hulbert, their attorneys, will apply to the Honorable Thomas W. Slick, Judge of said Court, in the room usually occupied by him as a courtroom, at 507 State Street, Hammond, Indiana, District and Division aforesaid, for the allowance of an appeal from the decree of said United States District Court

entered on the 13th day of September, 1933, in the above entitled cause.

NATIONAL BANK OF AMERICA and
DAVID H. JENNINGS, as Receiver for
National Bank of America.
By McMAHAN, STROM & HULBERT,
Their Attorneys.

We hereby acknowledge service of the foregoing notice and receipt of a copy thereof this 4th day of November, 1933.

ARTHUR L. GILLIOM,
Attorney for the Plaintiff, United States Fidelity & Guaranty Company, a corporation.

Filed Nov. 8, 1933. Margaret Cowgill, Clerk.

54 And thereupon the following further proceedings were had in said cause, to-wit:

Come now the defendants and file their assignment of errors, which reads in the words and figures following, to-wit:

55 * * (Caption) * * Filed Nov. 1933.

ASSIGNMENT OF ERRORS.

Come now the defendants, National Bank of America, a corporation, and David H. Jennings, as Receiver for the National Bank of America, by McMahan, Strom & Hulbert, their counsel, and jointly and severally respectfully represent and say to this Honorable Court that the decree entered in the above cause on the 13th day of September, 1933, A. D., is erroneous and unjust to the defendants. And said defendants file and submit the following assignment of errors upon which they and each of them will rely upon their appeal from said decree, and say that this Honorable Court erred in the following respects:

First: The Court erred in each of its several conclusions of law numbered One, Two, Three and Four.

Second: The Court erred in holding and decreeing that the plaintiff have and recover of and from the defendants the sum of $2,429.32, consisting of the principal sum of $2,196.89 and of interest in the sum of $232.43 out of the cash and cash items in the possession of the defendant, David

H. Jennings as Receiver for the National Bank of America, in preference over other creditors of said bank.

Third: The Court erred in holding and decreeing
56 that the plaintiff have and recover from the defendants the sum of $232.43 as interest on the sum of $2,196.89 adjudged and decreed to be owing the plaintiff.

Fourth: The Court erred in holding and decreeing that the sum of $2,429.32, or any part thereof, was a preferred claim to be paid by the Receiver in preference over creditors of the National Bank of America.

Fifth: The Court erred in enjoining each of the defendants from using so much of the cash and cash items in the possession of the defendant, David H. Jennings, as Receiver for the National Bank of America as needed to satisfy the judgment and decree appealed from.

Sixth: The Court erred in ordering and decreeing that the plaintiff recover from the defendants its costs, and that it should have execution therefor.

Seventh: The Court erred in not adjudging and decreeing that the plaintiff was entitled to recover of and from the defendants the sum of $2,196.89 and no more, as a general claim, to be paid by the Receiver of the National Bank of America out of the assets of said bank in the due course of the liquidation of said bank.

Eighth: The Court erred in decreeing that the cash items of the defendant, National Bank of America, became impressed with a trust in the plaintiff's favor in the sum of $2,196.89, and that the defendant, David H. Jennings, as Receiver for the National Bank of America, took over and received said sum of money subject to such trust.

Ninth: The facts found by the Court do not warrant or sustain the decree of the Court, that the plaintiff is entitled to have its claim allowed and paid out of the assets of the
57 National Bank of America in the possession of the Receiver, as a preferred claim.

Tenth: The Court erred in holding the preferred claim provisions of the Indiana Law, Chapter 164, Acts 1929, page 514, applies in winding up the affairs of a National Bank which is being liquidated under the National Bank Act.

Eleventh: The Court erred in holding that the provisions of the Act of the General Assembly of the State of Indiana, entitled: "An Act to expedite and simplify the collection and payment by banks of checks and other instruments for the payment of money," approved March 13, 1929, Acts 1929, page 514, is applicable in winding up the affairs of an insolvent National Bank which is being liquidated by a re-

ceiver appointed by the Comptroller of the Currency, and under the provisions of the National Bank Act.

Wherefore, the defendants jointly and severally pray that the said decree be reversed and that the District Court be instructed to enter a decree adjudging and decreeing that there is due and owing the plaintiff the sum of $2,196.89 as a general claim against the National Bank of America, to be paid in the course of administration, or that the Court of Appeals reverse said decree and render a decree on the record in favor of plaintiff for the sum of $2,196.89 as a general claim.

McMAHAN, STROM & HULBERT,
Attorneys for Defendants.

58 And thereupon, the following further proceedings were had in said cause, to-wit:

Come now the parties and file their stipulation waiving bond on appeal, which stipulation reads in the words and figures following, to-wit:

59 * * (Caption) * * Filed Nov. 1933.

STIPULATION WAIVING BOND ON APPEAL.

It is hereby stipulated by and between the parties hereto that with the approval of the court the filing of a bond by the appellants, National Bank of America and David H. Jennings, Receiver for the National Bank of America, on appeal from the decree or order of this court dated September 13, 1933, is hereby waived, and that such appeal may be prosecuted without the filing of such bond.

Dated November 8, 1933.

ARTHUR L. GILLIOM,
Attorney for Plaintiff.
McMAHAN, STROM & HULBERT,
Attorneys for Defendants.

66 And afterwards, to-wit, at the November Term of said court, and on the 5th day of December, 1933, before the Honorable Thomas W. Slick, Judge of said court, the following further proceedings were had in said cause, to-wit:

Come now the defendants and file petition for extension of time for filing transcript in Circuit Court of Appeals, which petition reads in the words and figures following, to-wit:

67 * * (Caption) * *

PETITION FOR EXTENSION OF TIME FOR FILING TRANSCRIPT IN CIRCUIT COURT OF APPEALS.

Comes now the defendants, National Bank of America and David H. Jennings, Receiver of National Bank of America, and shows to the court that heretofore, to-wit, on November 8, 1933, the said defendants filed their petitions herein for an appeal from the decree theretofore entered herein, to United States Circuit Court of Appeals of the Seventh Circuit; that said appeal was on said last named day, granted, and said defendants time for filing their transcript and perfecting appeal expires December 8, 1933; that citation was served upon the plaintiff on the 10th day of November, 1933, and that on the 13th day of November, 1933, these defendants filed their praecipe for a transcript of the record in the office of the clerk of this court; that the clerk of this court, because of the great volume of work which the clerk has been required to do since the 13th day of November, 1933, she has been unable to, and will not be able to prepare said transcript in time for the defendant's to file the same on or before December 8, 1933;

68 Wherefore, the defendants ask that the time within which they shall file their transcript in the office of the Clerk of the Circuit Court of Appeals be extended and enlarged to and including the 22nd day of December, 1933.

WILLIS C. MCMAHAN,
Attorney for Defendants.

State of Indiana, } ss:
County of Lake. }

WILLIS. C. McMAHAN, being duly sworn, deposes and says, that he is one of the attorneys for the defendants in the above entitled cause; that he has authority to and does make this affidavit for and on behalf of said defendants and states that the facts set forth in the above and foregoing petition are true. Further the affiant saith not.

WILLIS C. MCMAHAN.

Subscribed and sworn to before me this 5th day of December, 1933.

FRANK L. GREENWALD,
Notary Public.

My Commission Expires: 9/14/37

69 And thereupon, the following further proceedings were had in said cause, to-wit:

70 * * (Caption) * *

ORDER ON PETITION FOR EXTENSION OF TIME FOR FILING TRANSCRIPT IN CIRCUIT COURT OF APPEALS.

Comes now the defendants, National Bank of America, and David H. Jennings, as Receiver for the National Bank of America, and files their petition in these words insert: for an enlargement of time in which to file the transcript and record in the clerk's office of the United States Circuit Court of Appeals, Seventh Circuit, and the court having examined the same now grants said petition and gives unto the said defendant to and including the 22nd day of December, 1933, within which to file said record and transcript with the clerk of said Circuit Court of Appeals; all of which is adjudged this 5th day of December, 1933.

THOS W. SLICK,
Judge.

63 And afterward, to-wit, on the 13th day of November, 1933, being the November Term of said court, before the Honorable Thomas W. Slick, Judge of said Court, the following further proceedings were had, to-wit: Filed Nov. 1933.

Come now the defendants and file their praecipe for record, which praecipe reads as follows, to-wit:

64 * * (Caption) * *

PRAECIPE FOR RECORD.

To: The Clerk of the Above Court:

You are hereby requested to make a transcript of the record in the above captioned cause to be filed in the United States Circuit Court of Appeals for the Seventh Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to-wit:

1. The complaint.
2. The petition to remove from the Lake Circuit Court of

Indiana to the United States District Court for the Northern District of Indiana.

3. The notice of the filing of petition to remove and the acknowledgement of service of such notice.
4. Bond for Removal.
5. Stipulation to transfer to South Bend Division.
6. The answer filed May 15, 1933.
7. Plaintiff's Exhibit 1, being the agreed statement of facts.
8. Finding of Facts and Conclusions of Law.
9. Opinion of the Court.
10. The decree of the Court.

65 11. Notice of intention to apply for order allowing an appeal and acknowledgment of service of same.

12. Petition for allowance of appeal and endorsement of Judge allowing appeal.
13. Assignment of Errors.
14. Stipulation waiving bond on appeal.
15. Citation and acknowledgement of service.
16. This praecipe.
17. Clerk's certificate.

Said transcript to include all record entries and orders entered in said cause and to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Seventh Circuit and to be filed in the office of the Clerk of the Circuit Court of Appeals for the Seventh Circuit, on or before the 8th day of December, 1933.

In copying the order showing the filing of the stipulation of facts, you will not copy such stipulation in such order, but you will, at the proper place in such order, refer to the special finding of facts where such stipulation is set out in full and indicate that a copy of such stipulation is set out in full in the special finding of facts.

McMahan, Strom & Hulbert,
Attorneys for Appellants, National Bank of America and David H. Jennings, Receiver for National Bank of America.

Dated this 8th day of November, 1933.

Service of the above praecipe accepted and acknowledged this 8th day of November, 1933.

Arthur L. Gilliom,
Attorney for Appellee, United States Fidelity & Guaranty Company, a corp.

71 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Indiana,

Hammond Division.

CERTIFICATE OF THE CLERK OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA.

I, Margaret Cowgill, Clerk U. S. District Court, of the Northern District of Indiana, do hereby certify the above and foregoing to be a true and complete transcript of proceedings had of record, prepared and made by me as required by the praecipe filed in the cause entitled United States Fidelity & Guaranty Company, a corporation, *vs.* National Bank of America and David H. Jennings, as Receiver for the National Bank of America, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office in the City of Hammond, in said District, this 21st day December, 1933.

MARGARET COWGILL,
Clerk.

(Seal)

By BEULAH MCCABE,
Deputy.

60 And thereupon, the following further proceedings were had in said cause, to-wit:

And now a citation is ordered, which citation reads as follows, to-wit:

61 * * (Caption) * *

CITATION.

The United States of America to United States Fidelity & Guaranty Company, a corporation:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Seventh Circuit to be holden in the City of Chicago, Cook county, Illinois, within thirty (30) days from the date hereof, pursuant to a petition for appeal filed in the Clerk's office of the District Court of the United States for the Northern District of Indiana, Hammond Division, wherein the United States Fidelity and Guaranty Company is the plaintiff and the National Bank of America and David H. Jennings, as Receiver of the National Bank of America are defendants, to show cause, if any there be, why the decree in said petition for appeal mentioned should not be corrected and speedy justice be done in that behalf.

Given under my hand at the City of Hammond in the District and Circuit aforesaid, this, the 8 day of November, 1933, A. D.

THOS. W. SLICK,
United States District Judge for the Northern District of Indiana, Hammond Division.

Service of a copy of the above citation is hereby acknowledged this 10th day of November, 1933.

PICKENS, DAVIDSON, GAUSE, GILLIOM & PICKENS,
ARTHUR L. GILLIOM,
Attorneys for Plaintiff.

62 (Endorsed) * * (Caption) * * Citation Filed Nov 13 1933 Margaret Cowgill, Clerk. U. S. District Court.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages numbered from 1 to 40, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the eighteenth day of January, 1934, and used and considered at the hearing and on the determination of the following entitled cause:

National Bank of America and David H. Jennings, as Receiver of the National Bank of America,
Appellants,

vs.

United States Fidelity and Guaranty Company,
Appellee,

No. 5124, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 22nd day of June, A. D. 1934.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit, on the third day of October, 1933, of the October Term, in the year of our Lord One Thousand Nine Hundred and Thirty-Three, and of our Independence the One Hundred and Fifty-Eighth.

National Bank of America and David H. Jennings, as Receiver,
5124 *vs.*
United States Fidelity & Guaranty Company.

Appeal from the District Court of the United States for the Northern District of Indiana, Hammond Division.

And on, to-wit: On the twenty-second day of December, 1933, there was filed in the office of the Clerk of this court an appearance of counsel for appellants, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5124. October Term, 1933.

National Bank of America and David H. Jennings, as Receiver,
Appellants,

vs.

United States Fidelity and Guaranty Company, a Corporation,
Appellee.

The Clerk will enter my appearance as counsel for the appellants.

WILLIS C. MCMAHAN,
569 Broadway,
Gary, Indiana.

Endorsed: Filed January 18, 1934, Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-sixth day of December, 1933, there was filed in the office of the Clerk of this court the appearance of counsel for appellee, which said appearance is in the following words and figures, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5124. October Term, 1933.

National Bank of America and David H. Jennings, as Receiver,

Appellants,

vs.

United States Fidelity and Guaranty Company, a Corporation,

Appellee.

The Clerk will enter my appearance as counsel for the appellee.

ARTHUR L. GILLIOM,
Fletcher Trust Building,
Indianapolis, Indiana.

Endorsed: Filed December twenty-sixth, 1933, Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the tenth day of April, 1934, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 10, 1934.

Court met pursuant to adjournment and was opened by preclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.

5124 National Bank of America, *et al.*, *vs.* United States Fidelity & Guaranty Company. } Appeal from the District Court of the United States for the Northern District of Indiana, Hammond Division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing on April 13, 1934.

And afterwards, to-wit: On the thirteenth day of April, 1934, the following further proceedings were had and entered of record, to-wit:

Friday, April 13, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Louis FitzHenry, Circuit Judge.

5124 National Bank of America, *et al.* *vs.* United States Fidelity and Guaranty Company. } Appeal from the District Court of the United States for the Northern District of Indiana, Hammond Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Willis C. McMahan, counsel for appellants, and by Mr. Arthur C. Gilliom, counsel for appellee, and the court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the fourth day of June, 1934, there was filed in the office of the Clerk of this court the opinion of the court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5124. October Term, 1933, April Session, 1934.

NATIONAL BANK OF AMERICA and DAVID H. JENNINGS, as Receiver of the National Bank of America, *Appellants*,

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, *Appellee.*

Appeal from the District Court of the United States for the Northern District of Indiana, Hammond Division.

June 4, 1934.

Before EVANS, SPARKS, and FITZHENRY, *Circuit Judges.*

SPARKS, *Circuit Judge.* Appellee instituted this action in equity against the National Bank of America of Gary, Indiana, and David H. Jennings, its receiver, to recover the amount of a check which had been drawn on the Gary State Bank and mailed to and collected by the National Bank of America through the Gary Clearing House before the National Bank had closed.

On December 30, 1931, appellee received from the Commercial Trust Company of Gary that company's check for $2196.89, dated December 29, 1931, and payable to the order of appellee. On the date of its receipt appellee endorsed and deposited it with the Security Trust Company of Indianapolis, which in turn endorsed and delivered it to the Fletcher American National Bank of Indianapolis. That bank also endorsed and mailed it to its correspondent, the appellant bank,

for collection and remittance. The last named bank received it on the morning of December 31, 1931, and on the same day presented and collected it in the manner hereinafter described, from the Gary State Bank through the Gary Clearing House, whose membership consisted solely of the Gary banks hereinbefore mentioned.

In addition to this check, appellant bank had received other checks drawn on the Gary State Bank and the First National Bank of Gary, and as a result of the clearings of that day, appellant bank owed the clearing house $1044.75, for which sum it drew its check on the Continental Illinois Bank and Trust Company of Chicago, payable to the order of the clearing house. As a result of the clearing house transaction the Gary State Bank received the check for $2196.89, stamped it paid, charged it to the account of the Commercial Trust Company, and delivered it to the drawer.

All the banks herein referred to were closed for holiday on January 1, 1932, and on Sunday, January 3, the directors of appellant bank met and adopted a resolution not to open for business on January 4, at which time the bank was insolvent. The Comptroller of the Currency was notified, and the receiver took charge of the assets at eight o'clock on the morning of January 4.

On and prior to January 2, 1932, it was the custom of the Fletcher Bank to send checks drawn on Gary banks to appellant bank for collection, and the custom of the latter to present those checks to the Gary Clearing House for collection, and when collected, appellant bank would mail its check or draft on its correspondent bank to the Fletcher Bank in payment of the collection so made. That custom was followed in this instance.

The total amount of checks sent by the Fletcher Bank to and received by appellant bank on December 31, was $3660.83, and they were collected on that date through the clearing house, and appellant bank drew its draft on the Continental Bank for that amount and sent it to the Fletcher Bank, which in turn mailed it the same day to the Continental Bank, by which it was received on January 4, after appellant bank was closed. Hence payment was refused. At that time appellant bank had on deposit with the Continental a sum in excess of the amount of the draft.

The Fletcher Bank received the unpaid draft from the Continental on January 5, 1932, and charged it to the account of appellant bank, which left a deposit balance due appellant

bank from the Fletcher Bank of $333.91, which was paid to the receiver on March 3, 1932. Subsequently upon demand the Fletcher Bank paid to the receiver the amount of the draft which it had charged to appellant bank, and thereupon charged the amount of the check for $2196.89 against the Security Trust Company, which in turn charged the same amount to appellee's account. At the time the receiver took charge of appellant bank there were, and ever since that time there have been, in its possession, cash items in excess of appellee's claim.

The court found the facts specially and rendered its conclusions of law, and entered a decree for appellee for the full amount of the check, with interest, as a preferred claim. The theory upon which the bill and the decree were based was that at the time of the bank's insolvency it held in trust the amount of the proceeds of appellee's check among its cash and cash items, and that those proceeds constituted no part of the bank's assets, hence were not distributable to its creditors.

Whether a trust relationship existed between the bank and appellee, by virtue of the circumstances hereinbefore set forth, is to be determined by sections 1, 2, 9, and 10 of the Indiana Uniform Bank Collection Code, ch. 164, Indiana Acts, 1929. Section 1 defines the word "bank" as meaning any person, firm or corporation engaged in the business of receiving and paying deposits of money, and the word "item" as meaning any check, note or other instrument for the payment of money. Section 2 provides that, unless otherwise agreed, a bank receiving an item on deposit for collection, and all subsequent banks receiving it for that purpose, are agents and subagents, respectively, of the depositor. Section 9 provides that where ordinary care is exercised, any agent collecting bank, without becoming responsible as debtor therefor, may receive in payment of an item, whether presented by mail, through the clearing house, or over the counter of the drawee or payor, in lieu of money, either the check or draft of the drawee or payor upon another bank, or check or draft of any other bank upon any bank other than the drawee or payor of the item, or it may make such settlement as may be customary in a local clearing house or between clearing banks or otherwise. A proviso of this section states that the agent collecting bank shall become liable as debtor for the item as if it had actually received payment in cash, if at the time of receipt it shall request or accept in payment an unconditional

credit which has been given to it on the books of the drawee or payor, or on the books of any other bank. Section 10 provides that any agent collecting bank, in lieu of money, may receive from any subsequent bank in the chain of collection, remittance for an item which has been paid, in the same manner as set forth in section 9, and with the same provision with respect to establishing a debtor relationship upon the request or acceptance of an unconditional credit. In view of those sections of the Indiana Code it is obvious that the relationship existing between appellant bank and appellee, from and subsequent to the time it received the check for collection was that of agent and principal, and not mere debtor and creditor.

In the absence of statutory authority, or authority expressly granted by the terms of the agency, the collecting bank had no right to accept anything in payment except legal tender money, and if it had done so, the relationship of debtor and creditor would have arisen because the collecting bank in accepting other than cash in payment of the check would not have been acting within the scope of its agency (*Federal Reserve Bank* v. *Malloy,* 264 U. S. 160) and the trust relationship would not follow a subsequent transfer of the thing received as payment. But the first clause of section 9 specifically authorized the bank to receive the exchanged checks drawn on it and presented to it through the clearing house, in lieu of money in payment of appellee's check, without becoming responsible as debtor. It is true that the proviso in section 9 supplies means for establishing a debtor relation, but those means are not present here. It must be held under the state statute, therefore, that appellant was the agent of appellee, and in receiving the proceeds of the check it did so as trustee for appellee.

It is contended by appellants, however, that the Indiana statute will not override the provisions of R. S. 5236, 12 USCA sec. 194, which provides for the distribution by the Comptroller of the entire assets of the bank, giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming the notes. With respect to state legislation affecting national banks, the Supreme Court said, in *McClellan* v. *Chipman,* 164 U. S. 347:

> "First. National banks 'are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to

collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.' *National Bank* v. *Commonwealth*, 9 Wall. 362.

"Second. 'National banks are instrumentalities of the Federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a State to define their duties, or control the conduct of their affairs, is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiencies of these agencies of the Federal government to discharge the duties for the performance of which they were created.' *Davis* v. *Elmira Savings Bank*, 161 U. S. 275."

There is nothing in the Indiana statutes that attempts to interfere with the Comptroller's distribution of the bank's assets. The proceeds of appellee's check were not rightfully a part of its assets, and there is no effort here to secure a preference over any creditor in the distribution of the assets, or to interfere with the Comptroller in that respect. The effort on the part of appellee is merely to recover its own property which under the laws of Indiana was held in trust by the bank as agent for appellee. We know of no federal pronouncement which holds that a national bank may include in its distributable assets to its general creditors a fund which is held by it as trustee, when that fund has been traced into the hands of the receiver. There has been a contrariety of opinion among the state courts as to when a trust relationship arises with respect to banks acting as collectors of commercial paper, but not as to the Comptroller's duty when once that relationship is established. The right of Indiana to establish that relationship by legislative enactment was well within its powers and is controlling here.

The mere fact that a debtor and creditor relationship did not arise, under the Indiana statute, by virtue of acceptance and receipt by the appellant bank of some medium other than cash in payment for appellee's check, is not sufficient, however, to support a finding for appellee, unless it be shown that as a result of the transaction there was an augmentation of the cash and cash items of appellant bank; and that the proceeds of the collection have been traced into the hands of the receiver.

It is contended by appellants that the assets of the insolvent bank were not augmented by the transaction, for the reason that it received no actual money on account of the collection item, but used the check which it had received from the drawee, Gary State Bank, to pay items drawn on itself in the clearings. The cases cited to this proposition unquestionably support it, but it is contended by appellee that in none of those cases was the Uniform Bank Collection Code involved; that there the court held that the collecting bank had violated its agency agreement by wrongfully accepting payment in other than cash, which had the effect of raising a debtor and creditor relationship, whereas the Indiana enactment authorized the character of the payment and preserved the relationship of principal and agent.

It is quite obvious that that result was one of the principal objects of the Uniform Bank Collection Act, and we are convinced that its involvement here is quite sufficient to distinguish the instant case from those relied upon by appellants.

Appellee argues that when appellant bank exchanged appellee's check on the Gary State Bank for checks which the latter held against the former at the clearing house transaction, appellee's check, by virtue of section 9 of the Indiana Act, was not used to pay the appellant's debt to the clearing house, but it was a collection of the check in a manner authorized by the Act; hence that which it received is to be considered as proceeds of the check, and since appellant bank did not request or accept an unconditional credit for the item on the books of the Gary State Bank, or of any other bank, as provided under section 9, the bank did not become responsible as debtor for either the check or its proceeds, but it still was liable as agent. It further contends that the proceeds thus received in payment were the same as cash to appellant bank and were in contemplation of section 9 automatically reflected in the cash and cash items of that bank, after the clearing house transaction, because the cash and cash items became instantly relieved from the obligations of the checks received in exchange to the extent of appellee's check, and that the legal effect of the transaction was a substitution of cash and cash items held by appellant bank to the extent of $2196.89 for checks upon itself which it received as agent in payment of appellee's check. Hence it says there was augmentation of the cash and cash items to the extent of the proceeds of appellee's check, toward which appellant bank remained a fiduciary.

We are in accord with appellee's contention in this respect. It is conceded by appellants that if the balance of the clearings had been in favor of appellant bank it would be presumed that such balance was the proceeds of the collection item and should be allowed as a preferred claim, providing said balance had been paid in cash, and had been traced into the hands of the receiver. It must also be conceded that if appellant bank had paid cash to the clearing house for said bank's outstanding checks, and the clearing house had in turn delivered the cash to the bank in payment of appellee's check, and the proceeds had been traced into the hands of the receiver, those proceeds would be considered as held in trust by the bank for appellee by reason of the relationship of principal and agent. Under those circumstances augmentation of assets would clearly appear, notwithstanding the fact that the bank's assets were the same in amount as they were before the clearings, because during such process of clearing the assets would have been reduced by the cash payment to the clearing house and augmented in the same amount by the cash payment of the clearing house to the bank. Under the Indiana statute, however, it was immaterial whether actual cash passed in the transaction, for the result is identical, and the relationship of debtor and creditor did not arise. Appellant bank held the proceeds of appellee's check in a fiduciary capacity and it was its duty to treat them as such. This it did by immediately retaining and cancelling its own checks received from the clearing house, and drawing its draft on its cash balance in the Continental and sending it to the forwarding bank at Indianapolis. In other words, instead of taking the cash from its vaults and paying its indebtedness at the clearing house and in turn receiving it from the clearing house in payment of appellee's check, which in theory it was its duty to do, appellant bank obviously considered these things as having been done. To hold otherwise would be to presume that it had applied the proceeds of appellee's check to the payment of its own indebtedness thereby violating its trust relationship. The law will not presume that this was done, but rather that it regarded its trust obligation and kept it sacred. *Brennan* v. *Tillinghast*, 201 Fed. 609. We think it clear that the legal effect of the transaction was a substitution of cash and cash items held by appellant bank to the extent of $2196.89 in amount, for checks upon it which it received as agent in payment of appellee's check. It is stipulated that, but for the collection of appellee's check, appellant

bank would that day have actually paid to the clearing house the sum of $2196.89 more than it did pay, and the assets for distribution to creditors would have been decreased by that amount. In *Ellerbe* v. *Studebaker Corporation of America,* 21 F. (2d) 993, the court said, " * * * there can be no doubt that, as a result of the collection of the draft of complainant, the assets which came into the hands of the receiver were greater by the amount of the collection than they would have been had the collection not been made, and consequently that there was that much more for division among creditors than there would have been otherwise."

If appellee's check is to be considered as having been paid by the exchange of the unpaid checks of appellant bank, then it is clear that appellee would have been entitled to the bank's checks which were delivered to it by the clearing house, for under those circumstances appellee would have been subrogated to the rights of the original payees of the bank's checks. But it is obvious that the bank did not consider that appellee's check had in fact paid the bank's checks, for it retained and cancelled them, and this it could not rightfully do unless a corresponding amount of cash on hand be considered as substituted, on behalf of appellee, for the unpaid checks received from the clearing house. If appellants' contention be sustained they are placed in the situation of having received and retained the full amount of appellee's check, and also the bank's own checks for which it or the receiver paid nothing. It cannot be denied that appellee's check was paid by the Gary State Bank, and its assets were reduced by that amount, and it is equally clear that the same amount came into the possession of appellant bank. The clearing house transaction was practically instantaneous, yet it consisted of two distinct acts, the collection of appellant bank's obligations, and the payment of appellee's check. If either be considered as happening before the other, then it is clear that appellant bank's assets were augmented by the proceeds of appellee's check, and they were depleted by the payment of the bank's outstanding checks, and as a result the assets aggregated the same as before the clearance. As between the clearing house and appellant bank the latter's checks as a matter of commercial convenience were considered rightfully paid under the Indiana law, but as between the bank and appellee they were not paid by the bank, unless it be considered that a corresponding amount of cash was substituted for the unpaid checks. To

hold that there was no substitution would be presuming that the bank was guilty of wrong doing which is utterly inconsistent with its actions, and permit the creditors to participate in augmented assets to which they are not entitled, as a result of the wrongdoing. To hold otherwise would be consistent with the bank's actions and establish its good faith in performing the obligations of the trust. We hold, therefore, that the bank's assets were augmented by the receipt of the proceeds of appellee's check, and that those proceeds went into and were intermingled with the cash balance of the bank which was received by the receiver. Since the amount in the hands of the receiver was never reduced below the amount of the check, it follows that appellee is entitled to recover an amount equal to the face of the check. *Schumacher* v. *Harriett*, 52 F. (2d) 817.

We are convinced, however, that appellee is not entitled to recover interest. *White* v. *Knox*, 111 U. S. 784; *Richardson* v. *Louisville Banking Company*, 94 Fed. 442; *Hallett* v. *Fish*, 123 Fed. 201.

That part of the judgment which allows interest is reversed, and in all other respects the judgment is affirmed. The cause is remanded with instructions to modify the judgment by eliminating the amount allowed for interest.

And on the same day, to-wit: On the fourth day of June, 1934, the following further proceedings were had and entered of record, to-wit:

Monday, June 4, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Louis FitzHenry, Circuit Judge.

National Bank of America and David H. Jennings, as Receiver of the National Bank of America,
5124 *vs.*
United States Fidelity and Guaranty Company.

Appeal from the District Court of the United States for the Northern District of Indiana, Hammond Division.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that that part of the judgment of the said District Court in this cause which allows interest, be, and the same is hereby reversed; and in all other respects the said judgment be, and the same is hereby affirmed with costs.

It is further ordered that this cause be, and the same is hereby remanded to the said District Court with instructions to modify the judgment by eliminating the amount allowed for interest.

And afterwards, to-wit: On the nineteenth day of June, 1934, there was filed in the office of the Clerk of this court an application for stay of the mandate, which said application for stay of the mandate is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D., 1933.

No. 5124.

National Bank of America and David H. Jennings, as Receiver of the National Bank of America,
Appellants,

vs.

United States Fidelity & Guaranty Company,
Appellee.

APPLICATION FOR STAY OF PROCEEDINGS TO PERMIT APPLICATION FOR CERTIORARI.

Petition of National Bank of America and David H. Jennings, as Receiver for the National Bank of America, appellants above named for an order staying the execution and the enforcement of the decree of the United States Circuit Court of Appeals for the Seventh Circuit, affirming the United States District Court, Northern District of Indiana, to enable said National Bank of America and David H. Jennings, as Receiver of the National Bank of America to apply for and obtain writ of certiorari from the Supreme Court.

To the honorable William M. Sparks, Judge of the United States Circuit Court for the Seventh Circuit.

Your petitioners, National Bank of America and David H. Jennings, as Receiver for National Bank of America, respectfully present this their application for an order staying the execution and enforcement of the decree of the United States Circuit Court of Appeals for the Seventh Circuit, affirming the United States District Court, Northern District of Indiana, Hammond Division, in the above entitled cause, under the provisions of Section 350, Title 28, of the United States

Code to enable said petitioners to apply for and obtain a writ of certiorari from the Supreme Court of the United States.

The grounds upon which said petition for certiorari will be based are as follows:

1. The decision of this Honorable Court that Sections 1, 2, 9, and 10 of the Indiana Uniform Bank Collection Code, chapter 164, Indiana Acts, 1929, that the relationship existing between the National Bank of America and the United States Fidelity and Guaranty Company from and after the time said bank received the said check for collection, as mentioned and set forth in the opinion and decision of this court, was agent and principal and not debtor and creditor is in conflict with decisions of the Circuit Court of Appeals for the Fifth Circuit on the same subject matter in the case if *City of Miami* v. *First National Bank,* 69 Fed. (2nd) 346.

2. The decision of this Honorable Court by holding that the Indiana Uniform Bank Collection Code, chapter 164, Acts 1929, applied to and controlled the action of the receiver of an insolvent national bank is an erroneous decision of an important question of general law and is in conflict with the weight of authority.

3. That the decision of this Honorable Court as an augmentation of the funds of the National Bank of America by the use of the check which the United States Fidelity and Guaranty Company sent to the National Bank of America for collection, in discharging and paying the obligation of the National Bank of America to the clearing house, when the balance of the clearings of that day were against the National Bank of America, by holding and deciding that such transaction was not a use by the National Bank of America of the said check for the payment of a debt of the National Bank of America to the clearing house but "was a collection of the check in a manner authorized" by the Indiana Bank Collection Code although the balance of the clearings that day was against the National Bank of America, and that the funds and the assets of the National Bank of America was thereby augmented the same as if said bank had in making the collection of said check received the proceeds of said collection in cash, is an erroneous decision of an important federal question of law of great importance to the business world, to the legal profession, and to the Comptroller of the Currency, who is now engaged in liquidating numerous insolvent national banks, and which question has not been here-

tofore, but which should be decided by the Supreme Court so as to furnish an authoritative decision as to whether the funds of a national bank are augmented when a collection is made as the collection was made in the instant case.

4. The decision of this Honorable Court as to the augmentation of the funds of the National Bank of America by holding "that the bank's assets were augmented by the receipt of the proceeds of appellee's check, and that those proceeds went into and were commingled with the cash balance of the bank which were received by the receiver", is a decision of a federal question of law relating to the liquidation of insolvent national banks in a way, which is probably in conflict with the decisions of the Supreme Court.

5. The decision of this Honorable Court to the effect that the proceeds of the collection of the check which was collected by the National Bank of America through the clearing house were not dissipated when it was used by the National Bank of America to pay its clearing indebtedness to the clearing house, is in conflict with decisions of the Supreme Court of United States, and with the decisions of other Circuit Courts of Appeals.

6. The final disposition of this cause is of distinct class importance in the settlement of similar claims against insolvent national banks, being liquidated by the Comptroller of the Currency, and the decision of this Honorable Court is in a way probably in conflict with decisions of the United States Supreme Court applicable to the liquidation of the assets of insolvent national banks by the Comptroller of the Currency and calls for the United States Supreme Court's power of supervision.

The reasons why a stay is deemed necessary are as follows: The judgment of this Honorable Court and of the District Court as modified by the decree of this court requires that the appellant, David H. Jennings, as Receiver of the National Bank of America, pay forthwith to the appellee the sum of $2196.89 out of the cash and cash items in his possession, and permanently enjoin him as such receiver from using so much of the cash and cash items in his possession as may be necessary to satisfy said decree. Under this decree and mandate an execution can be issued to enforce and satisfy said decree and if the said receiver fails to pay and satisfy the amount decreed to be due the appellee, he will be guilty of contempt of court and subject to punishment therefor. If said receiver is compelled to pay and satisfy the said

sum so decreed to be due the appellee and the decision of this court is reversed by the United States Supreme Court further litigation may arise out of an attempt to force a return or repayment of any part of the money so paid by said receiver on account of the payment thereof to appellee.

Dated this 19th day of June, 1934.

WILLIS C. MCMAHAN,
Counsel for Petitioners.

OSCAR C. STROM,
GEORGE W. HULBERT,
Of Counsel.

Comes now the appellants, National Bank of America and David H. Jennings, as Receiver of the National Bank of America, and move the court to enter an order withholding the mandate in this case because it is the bona fide intention of the appellants to make proper application to the Supreme Court of the United States for a writ of certiorari in this case within 90 days from the date when the decision of this court was rendered herein and in support hereof appellants attach the professional statement of their counsel, Willis C. McMahan of Gary, Indiana.

I hereby certify that it is the bona fide intention of the appellants National Bank of America and David H. Jennings, as Receiver of the National Bank of America, to remove this case to the Supreme Court of the United States by appeal or to make application to said court for a writ of certiorari or do both, as he may be advised, within 90 days from the date when the decision of this court was rendered herein and I further certify and state that I believe there is merit in their case and that the judgment of the United States Circuit Court of Appeals in this case ought to be reversed by the Supreme Court of the United States.

WILLIS C. MCMAHAN,
Counsel for Petitioners.

OSCAR C. STROM,
GEORGE W. HULBERT,
Of Counsel.

Endorsed: Filed June 19, 1934, Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the nineteenth day of June, 1934, the following further proceedings were had and entered of record, to-wit:

Tuesday, June 19, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. William M. Sparks, Circuit Judge.

National Bank of America, *et al.*, vs. United States Fidelity and Guaranty Company.	Appeal from the District Court of the United States for the Northern District of Indiana, Hammond Division.
5124	

On application of the National Bank of America and David H. Jennings, as Receiver of the National Bank of America, appellants in the above entitled cause by Willis C. McMahan, their counsel, for a stay of execution of the decree of this Court and of the United States District Court for the Northern District of Indiana, Hammond Division, to enable the said National Bank of America and David H. Jennings, as Receiver of the National Bank of America, to apply for and obtain a writ of certiorari from the Supreme Court of the United States, and good cause therefor being shown, It is ordered that the execution and enforcement of said decree be, and it hereby is stayed pending appellants' petition in the Supreme Court of the United States for a writ of certiorari to this court, provided said petition for certiorari is presented with reasonable promptness in said Supreme Court.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 43 to 60, inclusive, contain a true copy of the proceedings had and papers filed, excepting briefs of counsel, in the case of

National Bank of America and David H. Jennings, as Receiver,

Appellants,

vs.

United States Fidelity & Guaranty Company,

Appellee,

No. 5124, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 22nd day of June, A. D. 1934.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

[fol. 62] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5659-C)